No. 84-4 (5)

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION, et al.,
Petitioners,

vs.

HAMILTON BANK OF JOHNSON CITY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Amici Curiae Brief of State of California ex rel. John K. Van de Kamp, Attorney General and California Coastal Commission, the Tahoe Regional Planning Agency, the States of Alaska, Florida, Iowa, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, North Carolina, Oklahoma, South Dakota, Utah, Vermont, Wisconsin, Wyoming, and the Territory of American Samoa.

IN SUPPORT OF REVERSAL

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(Continued on inside front cover)

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43 pp

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QUESTIONS PRESENTED

1. Where a land use regulatory measure enacted pursuant to the police power comes into conflict with property rights protected by the Fifth and Fourteenth Amendments, does a judicial decree remanding the matter to the regulatory body for appropriate corrective action constitute the appropriate remedy or does the Constitution compel forced purchase?

2. Can a taking be demonstrated a) by examining a portion of a unified land development project in isolation from the overall development; and b) based solely on a showing that the developer may be unable to realize a profit on each phase of the development, without reference to the developer's reasonable, investment-backed expectations concerning the project as a whole?

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases

Table of Authorities Cited

Cases

Table of Authorities Cited

Cases

Constitution

Statutes

Rule

Other Authorities

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Amici file this brief pursuant to Rule 36.4 of the Rules of the Supreme Court of the United States.

INTEREST OF AMICI

This brief is respectfully submitted in support of petitioner Williamson County Regional Planning Commission.

The seventeen states and territories which have joined as amici in this case, together with their politicai subdivisions, exercise regulatory power over the proposed use of land and water resources within their respective jurisdictions. Amici are charged with the delicate responsibility of balancing demands for growth and development against the need to preserve finite natural resources located within their borders. The nature of affected resources runs the gamut from shoreline areas to urban communities, coastal wetlands to rural farmlands. Proposed development projects that amici review on a regular basis are similarly multifaceted: residential subdivisions, commercial centers, recreational developments and coal mining projects are but a partial list. The power of state, regional and local governments to control untoward development in light of resource and population constraints has been recognized for generations. (*Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).)

In recent years, the need for amici to evolve planning mechanisms to meet increased population pressures has become apparent. California's experience with Lake Tahoe is illustrative. The Tahoe Regional Planning Agency was created by California and Nevada and approved by Congress following a general consensus that traditional land use planning measures were inadequate to preserve the unique Lake Tahoe Basin in the face of rapid growth. The Agency, created in 1969 and modified in 1980 by interstate compact (P.L. 91-148, 83 Stat. 360, amended by P.L. 96-551, 94 Stat. 3233.), is directed to adopt and administer a regional plan which allows limited development while recognizing and preserving Lake Tahoe's exceptional qualities.

T.R.P.A.'s actions to promote the protection of natural resources have resulted in substantial litigation. Landowners have repeatedly charged that the effect is to have inversely condemned their properties. (See, e.g., *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979).)

This agency has, in recent years, been engaged in inverse condemnation litigation in which the monetary claims aggregate many millions of dollars. The ability of T.R.P.A. to accomplish the mandates of Congress and amici States of California and Nevada would be severely harmed if damages are found to be an available remedy in such cases.

This experience is by no means unique to amici T.R.P.A. and the State of California. Other amici joining in this brief administer similar programs and confront related litigation on a continuing basis. The issues in this case are thus of critical importance to them, and amici therefore respectfully request that their contentions be considered in this case.

SUMMARY OF ARGUMENT

1. Traditionally, federal and state courts confronted with a regulatory measure that results in an unconstitutional taking of property have found equitable relief rather than damages to be the appropriate remedy. Consistent with precedent, amici submit that where such a regulatory taking exists, the preferable course is to remand the matter to the affected administrative or legislative body for corrective action under the continuing supervision of the trial court. This remedy properly leaves to the agency the decision to choose between acquisition of the property through exercise of the condemnation power, invalidation of the offending measure or other effective corrective action.

Compelled payment of damages in such cases, on the other hand, would have several unfortunate consequences. First, damages are not nearly as efficient a remedy as judicial remand. Second, imposition of the former remedy would raise serious separation of powers questions by forcing the judiciary to make de facto planning and budgetary decisions that have traditionally been left to other branches of government. Third, requiring money damages in the case of a regulatory taking carries the risk of fiscal chaos for state and local governments. Finally, such a holding would have a major chilling effect on the land use planning process, stifling attempts to fashion planning techniques made necessary by changing social circumstances.

Nor are damages required to cure a "temporary" taking. Judicial remand to the governmental entity involved, coupled with careful oversight and utilization by the courts of traditional sanctions when necessary, is equally effective and far less disruptive of the regulatory process.

2. No taking of respondent's property has been demonstrated in this case for two distinct reasons. First, in determining whether a taking had occurred, the Sixth Circuit inappropriately considered only a portion of the entire development rather than examining the uses which had already been allowed for the development as a whole. Second, the Sixth Circuit inappropriately determined that a taking had occurred based on nothing more than a determination that the developer would not make a profit on the segment of the development under examination. Nothing in the Constitution requires that developers be assured a profit on each parcel of property they acquire.

ARGUMENT

I

IF A REGULATORY MEASURE IS FOUND TO CONSTITUTE A TAKING OF PROPERTY BECAUSE OF ITS EFFECT ON A PARTICULAR PROPERTY OWNER, THE APPROPRIATE REMEDY IS TO REMAND THE MATTER TO THE GOVERNMENTAL ENTITY FOR APPROPRIATE CORRECTIVE ACTION; JUDICIALLY FORCED PURCHASE OF THE PROPERTY IS NEITHER MANDATED NOR WARRANTED

Amici submit that the record in this case, when applied to the standards created by the Court, compels the conclusion that no unconstitutional taking of respondent's property occurred as a result of petitioner's actions. (See part II, below.) Yet even if an unlawful taking was assumed to exist, established precedent and important considerations of public policy dictate that compelled payment of money damages is an inappropriate remedy.

A. The Court's Prior Decisions Do Not Support the Assertion That a Monetary Remedy Is Compelled for a Regulatory Action Which Constitutes a Taking

The theory that a land use regulatory measure might result in a constitutionally compelled award of damages is of recent origin:

> "During the first part of this century, courts had called harsh regulations takings, and, since no compensation had been offered, the courts invalidated them. It hardly occurred to anyone that if the regulation was a taking, then a possible remedy was for the property owner to sue in inverse condemnation. . . . "Until the 1970s, no reported case recognizing inverse condemnation for mere regulation could have been cited." (Hagman and Misczynski, *Windfalls for Wipeouts: Land Value Capture and Compensation* (1978) 256, 272.)

Indeed, Professors Hagman and Misczynski assert that the concept of compensable regulation was never even raised until 1953. (*Id.* at 256.)

In fact, several notable property law experts, in a comprehensive historical analysis of the taking clause, concluded that the clause was never intended to apply to regulation of land at all, and that it derived only

> "from the English nobles' fear of the King's seizures of land for his own use . . . But the use of land was being regulated—often very severely regulated—throughout English and early American history. Only around the turn of the Twentieth Century did judges and legal scholars popularize the notion that if regulation of the use of land became excessive, it could amount to the equivalent of a taking." (Bosselman, Callies and Banta, *The Taking Issue* (1973) 319.[1]

Even those scholars who seemingly concur in the views expressed in the dissent of Justice Brennan in *San Diego Gas & Electric Co. v. City of San Diego,* 450 U.S. 621, 636-661 (1981), acknowledge that the concept of a compelled damages remedy represents a departure from established law. (See, e.g., Cunningham, *Inverse Condemnation as a Remedy for "Regulatory Takings",* 8 Hastings Const. L.Q. 517 (1981): "The traditional recourse of landowners and land developers whose plans for profitable development of land are blocked by restrictive zoning or other land use regulations is a suit to invalidate the regulations on constitutional grounds.")

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[1] "The exact motivation for the adoption of the taking clause may never be ascertained, but at least one thing is clear; the draftsmen were not troubled by any issue involving regulation of the use of land. Such regulations had been standard practice in England and throughout colonial times and seem to have provoked no serious controversy. There is no evidence that the founding fathers ever conceived that the taking clause could establish any sort of restrictions on the power to regulate the use of land." (*Id.* at 104.)

The conclusions of these scholars are buttressed by legal precedent. Reviewing applicable case law, the First Circuit observed in 1980:

> "The remedy awarded in such cases . . . has not been the awarding of the value of the diminished property right, but a declaration of the invalidity of the purported exercise of the police power. [Citations omitted.] Our research has disclosed no case in which a federal court has ordered a state or local government unit to pay for a diminution of the value of a piece of property caused by a zoning regulation." (*Pamel Corp. v. Puerto Rico Highway Authority,* 621 F.2d 33, 35 (1st Cir. 1980).)

Traditionally, state courts have similarly rejected damages as remedy in regulatory takings cases in favor of invalidation or related equitable remedies.[2]

Thus, respondent's claim that "this Court has also recognized that . . . a temporary deprivation of property can constitute a taking for which damages are an appropriate remedy" in land use cases (Respondent's Brief in Opposition to Petition at 5) is fiction. The Court observed in *United States v. Central Eureka Mining Co.,* 357 U.S. 155, 166 n.12 (1958) that "Ordinarily, the remedy for arbitrary governmental action is an injunction, rather than an action for just compensation."

[2]A partial list of pertinent state court decisions includes *Davis v. Pima County,* 121 Ariz. 343, 590 P.2d 459 (1978) cert. denied 442 U.S. 942 (1979); *Gold Run, Ltd. v. Board of County Comm'rs,* 38 Colo. App. 44, 554 P.2d 317 (1976); *Mailman Dev. Corp. v. City of Hollywood,* 286 So. 2d 614 (Fla. App. 1974); *Holaway v. City of Pipestone,* 269 N.W.2d 28 (Minn. 1978); *Fred F. French Inv. Co. v. City of New York,* 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S. 2d 5, (1976), appeal dismissed, 429 U.S. 990 (1977); *Eck v. City of Bismark,* 283 N.W.2d 193 (N.D. 1979); *Fifth Ave. Corp. v. Washington County,* 282 Or. 591, 581 P.2d 50 (1978); *Gaeble v. Thornbury Township,* 8 Pa. Commw. 379, 303 A.2d 57 (1973); *Allen v. City & County of Honolulu,* 58 Ha. 432, 571 P.2d 328 (1977); *McShane v. City of Fairhault,* 292 N.W.2d 253 (Minn. 1980); *Agins v. City of Tiburon,* 24 Cal.3d 266, 157 Cal.Rptr. 372 (1979), aff'd. on other grds, 447 U.S. 255 (1980); *DeMello v. Town of Plainville,* 170 Conn. 675, 368 A.2d 71 (1976); *Trustee Under Will, etc. v. Town of Westlake,* 357 So.2d 1299 (La. 1978).

Respondent mistakenly relies upon past cases in which the federal courts have mandated compensation in the face of actual governmental seizure of private property. But such precedents simply reflect the rule that the United States and individual states may constitutionally enter into physical possession of property without first filing condemnation proceeding, and instead may take the property and require the owner to himself institute proceedings for compensation. (*United States v. Dow,* 357 U.S. 17, 21 (1958).) A corollary principle is that physical invasions of private property rights (so-called "physical invasion" cases) may trigger a requirement for compensation. (*United States v. Lynah,* 188 U.S. 445 (1903) (permanent flooding of plaintiff's land); *United States v. Causby,* 328 U.S. 256 (1946) (airplane overflights).) Where such action occurs, limiting the remedy to an award of damages may well be proper. The sometimes permanent nature of such takings accounts for the court's historical reluctance to utilize injunctive relief when to do so might frustrate legitimate government functions. (See, e.g., *Hurley v. Kincaid,* 285 U.S. 95, 104 (1932).)

Precisely the opposite considerations obtain in the case of alleged takings resulting solely from applications of the government's police powers (so-called "regulatory takings"). Such acts are neither permanent nor irreversible. This Court has previously recognized that the distinction between "physical invasion" and "regulatory" takings is one of kind rather than degree. (See *Penn Central Transportation Co. v. New York City, supra,* 438 U.S. 104, 124; *United States v. Clarke,* 445 U.S. 253, 257-258 (1980).) This critical difference accounts for the traditional judi-

cial preference for equitable remedies in the case of "regulatory takings," and damages in "physical invasion" cases.

B. Remanding a Regulatory Measure Which Constitutes a Taking of Property Is an Effective and Appropriate Remedy

Amici suggest that it is inappropriate for this Court to mandate payment of damages under a theory of inverse condemnation in cases involving takings arising out of regulatory conduct. The preferable rule following a finding of a taking is instead to remand the case to permit the agency and legislative body to make an informed decision as to whether to repeal the offending measure, acquire the parcel or take other sufficient corrective action.

This rule respects longstanding federal and state court precedents while avoiding the imposition of forced purchase on an agency that often lacks the requisite power, funds or desire to acquire property that has been "taken."[3] The Court should instead afford respondent a reasonable opportunity to cure the taking. In particular cases, purchase may ultimately be the optimum solution; in others, rescission or modification of the offending measure is appropriate. A blanket rule imposing damages as the exclusive remedy, however, would be inflexible and ultimately counterproductive. (See part I(C), below). The central point is that choice of the appropriate remedy should be left in the first instance to the governmental agency, to be made on the basis of informed decision-making.

The trial court, having initially found a taking, exercises its inherent and traditional supervisorial power to oversee the administrative decision-making process on remand.

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[3]We understand that petitioner Commission does not have the power of eminent domain. Amici California Coastal Commission and Tahoe Regional Planning Agency also lack such authority.

That a court can retain continuing jurisdiction over such developments is an unquestionable element of the trial court's equitable powers.

The trial court's retention of such an oversight role, moreover, overcomes any suggestion that public agencies will simply change an invalidated regulatory measure so as to frustrate both the judicial decree of invalidation and the landowner's private property rights. Public officials, after all, are sworn to uphold constitutional rights to the best of their ability, and they therefore are not likely knowingly and voluntarily to violate that oath. Nor do they lightly risk contempt of court sanctions for subverting judicial decrees. The courts, both state and federal, have sufficient enforcement powers to ensure that their orders are observed, including the ultimate power to mandate specific actions, if good faith responses are not forthcoming. There are thus numerous means, other than the drastic remedy sought here, to provide relief for improper governmental responses after a decree striking down a regulatory measure.

How this rule can and should be applied is illustrated by the California Supreme Court's recent decision in *Furey v. City of Sacramento*, 24 Cal.3d 862, 157 Cal.Rptr. 684 (1979), cert. denied 444 U.S. 976 (1979). There the court held that allegations that a city encouraged installation of public improvements with private funds, if proven, could constitute a taking where subsequent municipal zoning rendered those improvements worthless. The court, however, rejected an award of damages premised on a theory of inverse condemnation. It instead found it appropriate to remand the proceedings to the local governmental entities to afford them "a reasonable opportunity to make use of the reassessment procedures. . . . or to take other appropriate action directed toward ameliorating in equitable fashion the gross inequities which here appear."

(24 Cal.3d at 878, 157 Cal. Rptr. at 693[4]); see also *Ed Zaagman, Inc. v. City of Kentwood,* 406 Mich. 137, 277 N.W. 2d 475, 480-489 (1979) (requiring remand for administrative corrective action following judicial finding of a taking); *cf. Hernandez v. City of Lafayette,* 643 F.2d 1188, 1200-1201 (5th Cir. 1981), cert. denied 455 U.S. 907 (1982).)

Numerous legal commentators have agreed that judicial remand to the public agency is a remedy far preferably to mandated imposition of a damage award.[5]

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[4]In his *San Diego Gas & Electric* dissent, Justice Brennan characterizes California law as standing for the proposition that "[n]o set of factual circumstances, no matter how severe, can 'transmute' an arbitrary exercise of the city's police power into a Fifth Amendment 'taking.'" (450 U.S. at 642-643.) With all due respect, this perception is incorrect, as evidenced by the *Furey* decision. California courts have found takings to have occurred in a variety of factual contexts, with damages warranted in appropriate circumstances. (See, e.g., *HFH, Ltd. v. Superior Court,* 15 Cal.3d 508, 516 n.14, 125 Cal.Rptr. 365, 371 n.14 (1975); *Toso v. City of Santa Barbara,* 101 Cal.App.3d 934, 162 Cal.Rptr. 210 (1980); *Jones v. People ex rel. Dept. of Transportation,* 22 Cal.3d 144, 148 Cal.Rptr. 640 (1978); *Liberty v. California Coastal Commission,* 113 Cal.App.3d 491, 500-504, 170 Cal.Rptr. 247, 252-255 (1980).) What California law does provide is that the right to pursue judicial relief for an unconstitutional taking does not carry with it an unfettered right to a particular remedy. (*San Diego Land & Town Co. v. Neale,* 78 Cal. 80, 82, 20 P. 380, 381 (1888).)

[5]There have been innumerable law review articles written on this subject. See e.g., Mandelker, *Land Use Takings, The Compensation Issue,* 8 Hastings Const. L.Q. 491, 504-512 (1981); Comment, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance,* 26 Stanford L.R. 1439 (1974); Girard, *Agins: A Step in the Right Direction,* Land Use L. & Zoning Dig. (September 1979); Magavern, *The Evolution and Extension of the New York Law of Inverse Condemnation,* 24 Buff. L. Rev. 273 (1975); Clark and Kidman, *The Relationships of Just Compensation to the Land Use Regulatory Power,* 2 Pepperdine L. Rev. [illegible] (1975); Beuscher, *Land Use Controls: Cases and Materials,* (d ed. 1964) at 538-50; Wright, *Exclusionary Land Use Controls and the Taking Issue,* 8 Hastings Const. L.Q. 545, 578-583 (1981).

C. A Compelled Damages Remedy for a Regulatory Action Which Constitutes a Taking Contravenes Several Important Public Policies Warranting a More Flexible Approach

Numerous important considerations of public policy underlie the longstanding rule that judicially imposed damages are inappropriate in a case involving a regulatory taking. Several of the most important are summarized below.

1. Damages Are an Inefficient Remedy in Most Cases Involving a Taking Arising Out of Regulatory Conduct

Where application of regulatory measures have been found to effect a taking, it is incumbent upon the court to fashion the optimum remedy. Implicit is the duty to determine what type of relief is required to correct the wrong and how the court can most efficiently provide it.

The rule urged by respondent is of a most radical nature. In effect, it would tell a governmental entity that when the latter acted in a specific regulatory role, albeit improperly, it triggered compulsory acquisition of a fee or lesser interest in the land involved. "When you zoned it, you bought it" (or at least some interest in it). This would be true no matter how unintended the result or how disastrous the impact on the public treasury.

However, the mandatory damages remedy urged by respondent is short-sighted and ultimately counterproductive. In the case of a successful takings action brought against an agency that has impermissibly denied a development permit, for example, the aggrieved landowner could be awarded damages in lieu of the right to further pursue development options. Leaving aside the often illusory benefits government would obtain thereby, the interests of various third parties are ignored. The proposed project developer, if other than the landowner, would obtain no

benefit whatsoever from a damages remedy. Nor would surrounding landowners who may (or may not) stand to benefit from future development. Similarly overlooked are other potential beneficiaries of development, such as prospective residential or commercial tenants.

The corollary issue of valuation is also ignored by respondent's argument. In the event of direct or inverse condemnation warranting damages, government is presumably required to pay only for the property interest it received, not for the opportunity value lost to the property owner. (*United States* v. *Powelson,* 319 U.S. 266, 284 (1943.))

Damages may, of course, turn out to be the preferable remedy in a given case. *Compelled* payment of damages, however, does not represent the optimum course in all or even most takings litigation.

2. A Compelled Monetary Remedy for a Regulatory Action Which Constitutes a Taking Is Inappropriate and Would Effectively Transfer the Power of Eminent Domain from Legislatures to the Judiciary, And Is Therefore Inconsistent With the Separation of Powers Doctrine

The power to regulate and the power of eminent domain are two distinct powers of government. (See, e.g., *Fred F. French Invest. Co. v. City of New York,* 39 N.Y.2d 58, 350 N.E.2d 381, 384-385, 385 N.Y. Supp.2d 5, 8-9 (1976), app. dism. 429 U.S. 990 (1977).) The fact that the former may be limited by the same constitutional clause which limits the latter does not mean that the latter has been exercised when that limit is reached. Where the legislature has not chosen to exercise its eminent domain power, the courts should not compel its use as a damage remedy. This result simply recognizes the proper constitutional role of the legislative branch of government in determining when that legislative power should be exercised.

This distinction between agencies with the power to condemn and those which are not entrusted with such authority

also finds considerable support in the court's rationale in *NBH Land Co. v. United States,* 576 F.2d 317, 319 (Ct. Cl. 1978):

> "Cases of 'inverse' takings without physical invasion or ousters are not very numerous, and when they occur . . . this court has been careful to consider the role of Congress, and the taking, if not expressly authorized or directed by Congress, at least is a natural consequence of Congressionally approved measures . . . To reach the result of those cases here, in a case when the only participation by Congress has been to reject the acquisition out of hand, would strike a blow at the power of the purse. The exclusive assignment of that power to Congress is the foundation of our liberties."

The separation of powers issue engendered by respondent's theory was further noted in *Jacobson v. Tahoe Regional Planning Agency,* 474 F.Supp. 901, 904 (D.Nev. 1979), affd. on other grds., 661 F.2d 940 (9th Cir. 1981):

> "If a zoning ordinance is enjoined, the legislative body, rather than the court, can then decide whether the social benefits flowing from the plan warrant the exercise of eminent domain and the expenditure of public resources. When the legislature decides that the costs outweight the benefits, it can either abandon the objective entirely, enact less stringent regulation, or combine regulation with compensation" (quoting Comment, *Inverse Condemnation: Its Availability In Challenging the Validity of a Zoning Ordinance,* 26 Stanford L.R. 1439, 1451 (1974).)

(See also, *Agins v. City of Tiburon,* supra, 24 Cal.3d 266, 276, 157 Cal.Rptr. 372, 377 (1979).)

Thus, the courts have repeatedly emphasized that the legislature is the appropriate branch of government for a

determination of whether the condemnation power will be exercised and public funds expended.[6]

Some state legislatures have explicitly provided for such a determination in the regulatory measure itself. The Delaware Wetlands Statute (7 Delaware Code, Chapter 66), for example, provides that "if the Superior Court finds that the action appealed from constitutes a taking without just compensation, it shall invalidate the order and grant appropriate relief . . ." The effect of such an order is, however, stayed by statute for a period during which the Secretary of Natural Resources and Environmental Control may determine whether to invalidate his action or to initiate condemnation proceedings to acquire the fee or any lesser interest. A similar provision is provided in the Delaware Coastal Zone Act (7 Delaware Code, Chapter 70.) Other states have similar provisions. (E.g., Florida Land and Water Management Act, Fla. Stat. Anno. (West) §§ 380.085 (3), modeled on § 9-112 of the American Law Institute's Model Land Development Code (1976); Mass. Gen. Laws C. 131, § 40A, and C. 130, § 105.)

In summary, it is indisputably the court's obligation to determine whether a regulatory measure effects a taking in a particular case. But the weighing of costs and benefits leading to the decision whether compensation should be paid is properly left to the legislature rather than the courts.

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[6]California law, for example, provides detailed limitations and procedures for exercise of the eminent domain power. Under California law, state and municipal governments do not have the power of eminent domain unless authorized by statute, and they must adhere to the procedures established by statute. See generally Calif. Code of Civil Procedure §§ 1230.010 et seq.; see also *City of Beaumont v. Beaumont Irrigation District*, 63 Cal.2d 291, 46 Cal.Rptr. 465 (1965); *People v. Superior Court*, 10 Cal.2d 288, 73 P.2d 1221 (1937).

3. Adoption of the Rule Suggested by Respondent Would Result in Major Additional Fiscal Problems for State and Local Government

Closely related to the separation of powers concerns discussed above is the fact that the rule urged by respondent could undermine the fiscal well-being of state and local governments.

Since agencies such as petitioner and amicus Tahoe Regional Planning Agency have not been granted the power of eminent domain, it goes without saying that no funds have been appropriated to purchase property on their behalf or even to pay damages for temporary restrictions. State legislatures simply did not intend for petitioner Commission and similar planning bodies to commit public funds for the purchase of private property.

Judicially-compelled damages in this context could have major adverse fiscal consequences. With the advent of severe tax reduction measures across the nation, state and local governments are being asked to meet increasing demands with a stable or even declining revenue base.

Federal courts have recognized the adverse consequences of imposing upon the judiciary the de facto task of allocating public funds. "Federal enforcement of the inverse condemnation remedy would be a singularly inappropriate intrusion into the states' traditional domains of property law and land use policy." (*Pamel Corp. v. Puerto Rico Highway Authority, supra,* 621 F.2d 33, 36;[7] see also *Jacobson v.*

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[7]The power of federal courts to impose money damages against state and regional governments is further circumscribed under the Eleventh Amendment (*Pennhurst State School & Hospital v. Halderman*, .. U.S. . . ., 79 L.Ed.2d 67 (1984); *Citadel Corp. v. Puerto Rico Highway Authority*, 695 F.2d 31, 33n.4 (1st Cir. 1982)) and the abstention doctrine. (*Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *C-Y Development Co. v. City of Redlands*, 703 F.2d 375 (9th Cir. 1983).

Tahoe Regional Planning Agency, supra, 474 F.Supp. 901, 903: "TRPA does not have the power under the interstate compact to levy and collect revenue . . . A damage remedy may frustrate the budgeting of public funds"; *Agins v. City of Tiburon, supra,* 24 Cal.3d 266, 276, 157 Cal.Rptr. 372, 377.)

Respondent's position, if upheld, would significantly reduce if not emasculate legislative control over the proper allocation of often limited financial resources. For example, we are advised that the $350,000 awarded in damages against petitioner far exceeds the Commission's annual budget. Monetary judgments in such cases could well destroy state and local government's ability to provide other necessary public services. (Cf. *National League of Cities v. Usery,* 426 U.S. 833, 852 (1976).)[8]

The availability of damages in cases such as the instant litigation would spell fiscal disaster for state and local governments charged with administering extensive and complex land use programs. The Court should not impose such a rule, particularly where less burdensome and equally effective remedies are available.

[8]Petitioner's situation is by no means unique. Amicus Tahoe Regional Planning Agency, for example, has recently been sued by landowners in the Lake Tahoe Basin as a result of its adoption of a revised regional plan. Plaintiffs—who assert no bad faith or malicious conduct on the part of T.R.P.A.—seek damages that aggregate over $26 million. (*Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency,* E.D.Cal. Case No. CIV-S-84-0816-EJG; *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency,* D.Nev. Case No. CV-R-84-257-ECR.) These claims, if successful, would no doubt bankrupt the agency, which lacks insurance and depends on voluntary appropriations by amici States of Nevada and California for its major source of funding. The potential adverse consequences to the public as well as the Lake Tahoe environment are obvious.

4. The Compelled Payment of Damages as the Remedy in Land Use Cases Will Have a Chilling Effect on the Exercise of Necessary Governmental Functions

Last but certainly not least, the award of damages against land use planning entities is likely to have a major chilling effect upon this essential governmental function. Especially given the limited budgets of most such regulatory bodies, only the bravest official will venture more than the mildest, and most ineffectual, form of land use controls. As one commentator observed in reviewing the *Agins* case:

> "The upholding of Agins' position would have had only the effect of making local governments or public entities very cautious in the use of police power. They would retreat to the safety of proven regulations sanctioned by *stare decisis.* If this had been the meaning of *Euclid* and *Nectow,* very likely no one would have proposed the planned unit development, the cluster zone, or the floating zone, and even if those efforts had received the prior blessing of developers, it is highly unlikely that environmental concerns or regulation of coastal and inland waterways would ever have been risked.
>
> "The price that Agins urged and California rejected is too high to pay. To condone the concept of inverse condemnation in this area of the law is to deny the very first of the maxims of equity, which recognizes that the public interest must be the first concern of the law." Wright, *Exclusionary Land Use Controls and the Taking Issue,* 8 Hastings Const. L.Q. 545, 583 (1981).)

This Court has expressed the same concern. (*Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, supra,* 440 U.S. 391, 405; *Harlow v. Fitzgerald,* 457 U.S. 800, 814, 816 n.29 (1982).)

If governmental entities may exercise their regulatory powers only at the risk that they may have erred and therefore inadvertently "purchased" interests in regulated parcels, appropriate and necessary regulation of land by both traditional and modern methods will be substantially inhibited, with a predictable adverse effect on the nation's environment. As the Hawaii Supreme Court has put it:

> "Monetary awards in zoning disputes would inhibit governmental experimentation in land use controls and have a detrimental effect on the community's control of the allocation of its resources." (*Allen v. City and County of Honolulu,* 571 P.2d 328, 331 (Ha. 1977).

The New York Court of Appeals has expressed the same view:

> "[T]he prospect of tort liability might impede . . . desirable governmental regulation and legislation since [governmental] officers might fear subsequent judicial imposition of massive tort recoveries. Open-ended liability could inhibit the enactment of needed, but constitutionally borderline legislation. The most salutary and effective means to curtail unconstitutional action is to stop the action before it can take effect. Indeed, the prospect of a tort action might incite potential plaintiffs to cumulate their damage and institute their constitutional claims only after significant passage of time and significant reliance upon the heretofore unchallenged validity of its action by the governmental unit involved. In the absence of legislative guidance and compelling precedent, we decline to extend tort liability for unconstitutional action to situations where government has not trespassed in some manner upon the burdened property." (*Charles v. Diamond,* 41 N.Y.2d 318, 360 N.E.2d 1295, 392 N.Y.S.2d 594, 604-605 (1977), see also *CEEED v. California Coastal Zone Conservation Commission,* 43 Cal.App. 3d 306, 327, 118 Cal.Rptr.315, 330 (1974).)

This Court has consistently emphasized that a damage remedy should not be available where it would have such a chilling effect:

> "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subject to the cost and inconvenience and distraction of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." (*Tenney v. Brandhove,* 341 U.S. 367, 377 (1951).)[9]

Finally, imposition of a mandatory damages remedy in regulatory takings cases could discourage state and local governments from participating in a wide variety of federal programs that depend for their effectiveness on state and local implementation. (See, e.g., Coastal Zone Management Act of 1972, 16 U.S.C. 1451 et seq.; *cf.* Tahoe Regional Planning Compact, P.L. 96-551, 94 Stat. 3233.)

Accordingly, the potential chilling effect on vital governmental functions is yet another reason why the decision below should be reversed.

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[9]It is also important to emphasize the costs of litigating an action in which damages are a possible remedy, as opposed to an action in which invalidation is the result. In an action for damages after the finding of a taking, the parties must proceed to try the issue of the fair market value of the property, with all the attendant complexities and costs of an eminent domain proceeding. Moreover, even if the public agency is successful in prevailing in the appellate courts, it cannot recover its complete defense costs. The simple potential for incurring all or part of such costs, even in a successful action, is thus an additional inhibiting factor to any regulatory agency.

D. Recent Decisions of This Court Involving Constitutional Torts by Government Officials and 42 U.S.C. § 1983 Suggest Federal Deference to Available State Remedies; Land Use Regulations Is Perhaps the Classic Example of "Special Circumstances Counseling Hesitation" Where Money Damages Would Be Inappropriate

Respondent asserts that it is constitutionally entitled to a damages remedy because invalidation of zoning and planning measures found to constitute a taking would be an inadequate remedy for constitutional violations. Yet principles of federalism afford state courts broad discretion in fashioning remedies for violations of federal rights, so long as the state courts afford an adequate remedy. (See generally Hill, *Constitutional Remedies,* 60 Colum. L. Rev. 1109, 1118 (1969). This Court has interfered with the states' choice of remedy for violation of a federal right only where the sole remedy offered in the state courts is wholly inadequate, in effect denying any relief for the violation. (*Abood v. Detroit Board of Education,* 431 U.S. 209, 237-242 and n.45 (1977); see also, *Miranda v. Arizona,* 384 U.S. 436, 467 (1966).) Indeed, this Court has specifically expressed a willingness to defer to traditional remedies afforded under state law in the face of state or local actions resulting in a taking. (*Parratt v. Taylor,* 451 U.S. 527, 537-539 (1981).)

Nor do past cases involving damage actions arising either directly under a provision of the Constitution or under 42 U.S.C. 1983 assist respondent. (E.g., *Owen v. City of Independence,* 445 U.S. 622 (1980); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1977).) In these decisions, as well as in others involving a constitutional claim to a monetary damage remedy, the Court has consistently emphasized that there may be "special circumstances counselling hesitation" where money damages would not be appropriate. (*Bivens,* 443 U.S. at 396-397; *Owens,* 445 U.S. at 651; see also, *Carlson v. Green,* 446 U.S. 14 (1980); *Davis v. Passman,* 442 U.S. 228 (1979).)

Amici respectfully submit that the factors discussed in part I(C) of this brief are "special circumstances counselling hesitation," and that a compelled damage remedy is singularly inappropriate in the case of an unconstitutional land use regulation. It is not "damages or nothing" in this case (cf. *Bivens,* 403 U.S. at 410 (J. Harlan, dissenting)); another "remedy, equally effective," exists. A federally mandated damage remedy here "would be a singularly inappropriate intrusion into the states' traditional domains of property law and land use policy," since it would, in effect, constitute a judicial exercise of the legislative power of eminent domain. (*Pamel Corp. v. Puerto Rico Highway Authority, supra,* 621 F.2d 33, 36; *Jacobson v. Tahoe Regional Planning Agency, supra,* 474 F.Supp. 901, 903-904.)

E. "Interim Damages" Are Not Required to Compensate Landowners for "Temporary" Takings. Judicial Remand to the Affected Agency, Coupled With Effective Court Oversight, Affords a Fully Sufficient Remedy

Respondent suggests that the equitable remedies which have always been available under American law to address a regulatory taking are inadequate to cure injuries attributable to a "temporary" or "partial" taking. Justice Brennan's dissent in *San Diego Gas & Electric, supra,* 450 U.S. 621, 636-661, affords some support for this proposition. Yet amici believe that the traditional remedy of judicial remand to the agency for appropriate corrective action, coupled with diligent, continuing court oversight, is a fully adequate remedy.

Faced with a regulatory measure perceived to be unconstitutional, a landowner bears the responsibility to secure judicial review promptly. Assuming this is done, the courts

are fully capable of resolving the controversy with dispatch.[10]

Assuming that a regulatory body is acting in good faith, courts have consistently held that such temporary interferences with construction projects do not give rise to a taking. Justice Powell observed for a unanimous Court in *Agins v. City of Tiburon, supra,* 447 U.S. 255, 263n.9, for example:

> "Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.'"

(See also 2 J. Sackman & P. Rohan, *Nichols' Law of Eminent Domain* §6.13[3] (3d ed. 1979); *HFH, Ltd. v. Superior Court,* 15 Cal.3d 508, 518-520, 125 Cal.Rptr. 365, 372-74 (1975).)

The Fifth Circuit in *Hernandez v. City of Lafayette, supra,* 643 F.2d 1188, 1200, concluded that "a 'taking' does not occur until the municipality's governing body is given a realistic opportunity and reasonable time within which to review its zoning legislation vis-a-vis the particular property and to correct the inequity." Adopting the

[10]The present case provides an excellent illustration. Petitioner denied respondent's development application in June 1981. Respondent brought the instant suit two months later. Trial was held and a verdict reached in April 1982—a mere nine months subsequent. Yet respondent claimed, and the Court of Appeals agreed, that the former was entitled to $350,000 in interim damages as the result of this short delay. And this was despite the fact that normal delays in the land development process, independent of petitioner's actions, had already consumed eight years before the application in question was denied.

remand remedy outlined in part I(B) above, the *Hernandez* court expressly rejected the notion that temporary diminutions in value could amount to a taking for which compensation is required. (*Id.* at 1201.)

Indeed, numerous federal and state court decisions have upheld the power of agencies unilaterally to impose good faith moratoria on land use development. (*Donohue Construction Co., Inc. v. Montgomery Co.,* 567 F.2d 603, 608 (4th Cir. 1977); *Smoke Rise, Inc. v. Washington Suburban Sanitary Comm.,* 400 F.Supp. 1369, 1382-1383 (D. Md. 1975); *Miller v. Board of Public Works,* 195 Cal. 477, 234 P. 381 (1925), cert. denied 273 U.S. 781 (1927).) The present case is closely analogous.

Damages are therefore unnecessary in the vast majority of cases in which temporary regulatory takings are the product of good faith, reasonable governmental attempts to administer land use programs.

Left to be considered is the rare case where malicious or wanton conduct is at work. (E.g., *San Diego Gas & Electric Co. v. City of San Diego, supra,* 450 U.S. 621, 655 n.22 (Brennan, J., dissenting.) Such conduct cannot and should not be condoned. Yet this Court has had little difficulty fashioning precise rules to correct intentional constitutional torts in a variety of contexts. (See, e.g., *New York Times v. Sullivan,* 376 U.S. 254 (1964); *City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 269-270 (1981); *Harlow v. Fitzgerald, supra,* 457 U.S. 800, 817-819.) There is no reason to believe that it is any less able to articulate such effective and precise sanctions in the case of zoning officials who knowingly abuse their important offices.[11]

[11]Such is not, of course, apposite in the present litigation. The jury reached a special verdict that petitioner was acting in good faith and without malice in denying respondent's project application. (Appendix to Petition for Certiorari at 24a.)

In the vast majority of cases, however, it is indisputable that state, regional and local planning officials engage in conduct that "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (*Harlow v. Fitzgerald, supra*, 457 U.S. at 818.) Inadvertent regulatory excess under such circumstances can be corrected fully by remanding the matter to the administrative/legislative body for corrective action. Under the watchful eye of the reviewing court, effective relief can be secured swiftly and efficiently. (See part I(B), above.)

II

NO TAKING HAS BEEN SHOWN TO HAVE OCCURRED IN THIS CASE

While the issue of whether a monetary remedy is constitutionally required for "regulatory takings" is both interesting and very important, it need not be reached in this case, for the district court correctly found that no taking had occurred.[12]

[12]It is doubtful that the taking question raised by respondent is even ripe for judicial review, as there seems to be no evidence that respondent ever attempted to submit an application to petitioner complying with the ordinances in question. In that posture, the case lacks the "concrete controversy" described by this Court in *Agins, supra*, 447 U.S. 255, 260, notwithstanding testimony from respondent's appraiser about what the ordinances allowed. (See *Hamilton Bank of Johnson City v. Williamson County Regional Planning Commission*, 729 F.2d 402, 406 (6th Cir. 1984). The rejection of a preliminary plat, apparently prepared without any effort to comply with the regulations in question, cannot be sufficient to constitute a taking, especially when it is conceded that some additional development will be allowed.

A. The Courts Below Inappropriately Chose to Consider Only the Portion of the Development Owned By Respondent, Rather Than the Integrated Project as a Whole, in Determining Whether a Taking Had Occurred

While this Court has repeatedly recognized the difficulty inherent in determining whether a taking has occurred in a particular case,[13] the applicable precedents make it clear that no taking occurred here.

The fundamental flaw in the Sixth Circuit's analysis of the taking question is its description of the property with which it is concerned: "The property in question in this case is *the as yet underdeveloped portion of a residential subdivision.*" (729 F.2d at 406.) (Emphasis added.) It is only this artificial dissection of the property by the respondent that made it possible to find that the property at issue "had no remaining significant value," (*id.*) when in fact 212 houses had already been built as part of the same development. For the court to consider only part of the development for purposes of the taking analysis was plainly incorrect.

This Court's decision in *Penn Central Transportation Co. v. City of New York, supra*, 438 U.S. 104, is dispositive. Rejecting the argument that the rights to develop the airspace above Grand Central Terminal had been taken regardless of whatever value might inhere in the existing structure, the Court noted:

> " 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a certain segment have been entirely

[13]See, e.g., *Penn Central Transportation Co. v. City of New York, supra*, 438 U.S. at 123-24 (1978); *Loretto v. Teleprompter Manhattan CATV Corp.*, 453 U.S. 419, 426 (1982); *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 294-95 (1981).

abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here the city tax block designated as the 'landmark site.'" (438 U.S. at 130-31; see also *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979).)

Thus, in determining whether the property at issue here had been taken, it is necessary to examine the entire development rather than only the portion now owned by the bank. Since this approach was not followed by the courts below, no findings were made as to whether the parcel, with 212 existing units and apparently at least 67 more allowable, had been "taken."

A different result cannot obtain merely because the original owners of the development have now sold a portion of it to respondent. This would allow to be done by indirection precisely what was forbidden in *Penn Central*. Put another way, the validity of governmental regulations cannot change with shifts in ownership of the property being regulated. For example, if Penn Central were now to sell its air rights above Grand Central Terminal, the new owner would not be able to allege a taking any more successfully than could Penn Central itself. Similarly, as long ago as 1927, this Court upheld set back regulations requiring developers not to build within a given distance of the edge of their property against an argument that this constituted a taking of the property to be left vacant. *Gorieb v. Fox*, 274 U.S. 603 (1927). Surely the result would not be different had the set back areas been sold to a third party.[14]

[14]It was only by considering the original plans for the entire development that either of the courts below was persuaded that the respondent had acquired any expectations concerning the ability to build on the land now at issue. The artificial nature of the division employed in the decision below is therefore particularly glaring.

B. The Court of Appeals Erroneously Determined That the Ordinances in Question Were Required to Ensure a Profitable Use of Respondent's Property

Related to the artificial division of one development into two parcels for purposes of analyzing the taking question is the Sixth Circuit's analysis of the "economic viability" of plaintiff's parcel in isolation from the project as a whole.[15]

The Court of Appeal erroneously interprets prior cases to require that government allow uses which will make the ownership of every parcel of land economically viable.[16] This is not the law, any more than is the government required to insure the profitability of any other investment. Examples are obvious. One who buys a parcel on top of a mountain will obviously encounter tremendous costs in attempting to provide urban services such as water and electricity. The fact that these services will be expensive does not somehow entitle the mountain's owner to construct a 200-story condominium tower, even if that is the only density which could reasonably be expected to yield a sufficient return to finance the extension of urban services. Were this not true, the parcels most ill-suited financially for intensive urban development, i.e., those furthest from the necessary services, would be entitled to the most intensive use since they would require the most intensive use to be financially viable. There are parcels of land which cannot yield a reasonable return on *any* investment. No governmental entity is required by the United States Constitu-

[15]The Sixth Circuit found a taking based on testimony that only 67 new building sites could be developed and that the cost of meeting the conditions of approval would be too great to permit a development of 67 houses to be profitable. (720 F.2d at 406.)

[16]The Court of Appeals seems to have applied only the economic viability test in determining whether a taking had occurred. It makes no mention of the extent of the investment the respondent had made in this property or of what reasonable expectations it could have formed at the time the investment was made.

tion to remedy this simple fact of nature and economics. Nor is government required to assure that all investors in real estate will make money.

CONCLUSION

For the foregoing reasons, amici curiae respectfully submit that the decision of the Court of Appeals for the Sixth Circuit, insofar as it finds petitioner liable in damages, should be reversed.

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